

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHIGAN SUGAR COMPANY,

Defendant.

Civil Action No.

CONSENT DECREE

WHEREAS Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a complaint in this action alleging that Defendant, Michigan Sugar Company ("Michigan Sugar" or "Settling Defendant"), violated Parts C and D of the Clean Air Act ("Act"), 42 U.S.C. §§ 7470 through 7492 and §§ 7501 through 7515 at its Bay City Facility located at 2600 South Euclid Avenue, Bay City, Michigan ("Facility") and seeking injunctive relief and the assessment of civil penalties pursuant to Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477;

WHEREAS the Complaint alleges that Settling Defendant commenced construction of a Pulp Dryer ("Pulp Dryer #3") at its Bay City Facility in 1984 without obtaining a Prevention of Significant Deterioration ("PSD") permit for Pulp Dryer #3 that addressed carbon monoxide ("CO") emissions, as required by Section 165 of the Act, 42 U.S.C. § 7475, 40 C.F.R. § 52.21(i), and the Michigan State Implementation Plan ("SIP");

WHEREAS the Complaint alleges that Settling Defendant commenced construction of Pulp Dryer #3 at its Bay City Facility in 1984 without obtaining a New Source Review (“NSR”) permit for Pulp Dryer #3 that addressed volatile organic compounds (“VOC”) emissions, as required by Section 173 of the Act, 42 U.S.C. § 7503, and R 336.1201 of the Michigan Air Pollution Control Rules, approved on May 6, 1980, as part of the federally enforceable Michigan SIP.

WHEREAS the Complaint alleges that Settling Defendant increased its annual hours of operation at its Bay City facility in 1995 beyond the federally enforceable permit conditions for Pulp Dryers ## 1, 2, and 3, without obtaining a PSD permit for Pulp Dryers ## 1, 2 and 3 that addressed carbon monoxide (“CO”) emissions, as required by Section 165 of the Act, 42 U.S.C. § 7475, 40 C.F.R. § 52.21(i), and the Michigan SIP;

WHEREAS the Complaint alleges that Settling Defendant increased its annual hours of operation at its Bay City facility in 1995 beyond the federally enforceable permit conditions for Pulp Dryers ## 1, 2, and 3, without obtaining a NSR permit for Pulp Dryers ## 1, 2 and 3 that addressed VOC emissions, as required by Section 173 of the Act, 42 U.S.C. § 7503, and R 336.1201 of the Michigan Air Pollution Control Rules, approved on May 6, 1980 as part of the federally enforceable Michigan SIP;

WHEREAS the United States and Settling Defendant (the “Parties”) have agreed that settlement of this action is in the best interest of the Parties, and in the public interest, and have further agreed that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter;

WHEREAS Settling Defendant has entered into this Consent Decree without admitting any liability to Plaintiff arising out of the transactions or occurrences alleged in the Complaint;

WHEREAS on June 1, 2005, EPA issued a Notice of Violation ("NOV") and on September 13, 2005, an Amended Notice of Violation to Michigan Sugar alleging violations of Part C of the Act, 40 C.F.R. § 52.21, Part D of the Act and the Michigan SIP adopted under the Act, *inter alia*, at the Sebewaing, MI facility. Based on the information EPA has as of the date of lodging of this Consent Decree, EPA has no intention to take further action pursuant to the Notice of Violation and Amended Notice of Violation for the Sebewaing, MI facility for the violations alleged in the June 1, 2005, NOV and September 13, 2005 Amended NOV;

WHEREAS Settling Defendant has installed a fluidized bed steam pulp dryer for drying sugar beet pulp at its Bay City Facility. Settling Defendant's MDEQ-approved Permit to Install states that the fluidized bed steam pulp dryer is energy-conserving and is expected to have negligible air emissions when operated by Settling Defendant consistent with good engineering practices to minimize emissions to the maximum extent practicable and in compliance with the Permit to Install. Settling Defendant expects to continue to implement the fluidized bed steam dryer, or alternative non-air pollutant-emitting technology whenever drying sugar beet pulp at its Bay City Facility; and

WHEREAS the United States and Michigan Sugar recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I (Jurisdiction and Venue), below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477, and over the Parties. Venue lies in this District pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391 (b) and (c) and 1395(a), because the violations alleged in the Complaint occurred in, and Settling Defendant conducts business in, this judicial district. For purposes of this Decree, Settling Defendant does not contest the Court's jurisdiction over this action or over Settling Defendant and does not contest venue in this judicial district.

2. The Complaint states claims upon which relief may be granted pursuant to Sections 165 and 173 of the Act, 42 U.S.C. §§ 7475 and 7503.

3. Notice of the commencement of this action has been given to the State of Michigan, as required by Section 113 (b) of the Act, 42 U.S.C. § 7413(b).

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States, and upon Settling Defendant and any successors, assigns, or other entities or persons otherwise bound by law.

5. No transfer of ownership or operation of the Facility, whether in

compliance with the procedures of this Paragraph or otherwise, shall relieve Settling Defendant of its obligation to ensure that the terms of the Consent Decree are implemented, unless the transferee agrees to undertake the obligations required by this Consent Decree, agrees to be added as a Party under the Consent Decree, and agrees to be bound jointly and severally with the Settling Defendant by the terms thereof. The transferee's satisfaction of the obligations under the Consent Decree shall constitute compliance with the Consent Decree. The United States may refuse to approve the addition of the transferee as a Party if it determines that the proposed transferee does not possess the requisite financial and technical capabilities to fulfill the assumed obligations of the Consent Decree. The United States' decision to refuse to approve the addition of the transferee as a Party shall not be subject to judicial review. At least thirty (30) days prior to such transfer, Settling Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region 5, the United States Attorney for the Eastern District of Michigan, and the United States Department of Justice ("DOJ"), in accordance with Section XIV (Notices) of this Consent Decree. Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree.

6. Settling Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any contractor retained to perform work required under this Consent Decree. Settling Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Settling Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in the Act, or in regulations promulgated pursuant to the Act, shall have the meaning assigned to them in the Act and such regulations. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Act" or "CAA" shall mean the Clean Air Act, as amended, 42 U.S.C. §§ 7401-7671q;
- b. "Campaign Year" shall mean the annual season during which Settling Defendant conducts its sugar beet processing operations, which begins on or about September 1 of each calendar year and ends on or about May 31 of the following calendar year;
- c. "Complaint" shall mean the Complaint filed by the United States in this action;
- d. "Consent Decree" shall mean this Consent Decree and the appendix attached hereto (listed in Section XXIII) (Appendix) and all amendments and modifications thereto;
- e. "Day" shall mean a calendar day unless expressly stated to be a "Working Day." "Working Day" shall mean a day other than a Saturday, Sunday or federal or State holiday. In computing any period of time under this Consent Decree, where the last day

would fall on a Saturday, Sunday, or federal holiday or State holiday, the period shall run until the close of business of the next working day;

f. “Effective Date” shall mean the date of entry of this Consent Decree by the Court after satisfaction of the public notice and comment procedures of 28 C.F.R. § 50.7 and Section 113(g) of the Act, 42 U.S.C. § 7413(g), pursuant to Paragraph 51 of this Consent Decree;

g. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

h. “Facility” shall mean Settling Defendant’s Bay City Facility operations used for processing sugar beets, including but not limited to, the drying of sugar beet pulp, located at 2600 South Euclid Avenue, Bay City, Michigan, and described on the Facility map shown in Appendix A;

i. “Michigan DEQ” shall mean the State of Michigan Department of Environmental Quality and any successor entities and/or organizations;

j. “Michigan SIP” shall mean the federally approved and enforceable plan adopted by the State of Michigan pursuant to Section 110 of the CAA, 42 U.S.C. § 7410;

k. “MmBTUs” shall mean million British Thermal Units of heat input;

l. “NSR” shall mean the nonattainment New Source Review program of Part D of Subchapter I of the Act, 42 U.S.C. §§ 7501-7515, and 40 C.F.R. Part 51;

m. “Paragraph” shall mean a portion of this Consent Decree identified by an arabic numeral;

- n. "Parties" shall mean the United States and Settling Defendant;
- o. "PSD" shall mean the Prevention of Significant Deterioration program within the meaning of Part C of Subchapter I of the Act, 42 U.S.C. §§ 7470-7492, and 40 C.F.R. Part 52;
- p. "Pulp Dryer #1" shall mean the 45 mmBTU/hour capacity natural gas-fired rotary drum pulp dryer equipped with multicyclone and wet fan scrubber at Settling Defendant's Facility and identified in Appendix A hereto;
- q. "Pulp Dryer #2" shall mean the 45 mmBTU/hour capacity natural gas-fired rotary drum pulp dryer equipped with multicyclone and wet fan scrubber at Settling Defendant's Facility and identified in Appendix A hereto;
- r. "Pulp Dryer #3" shall mean the 74.5 mmBTU/hour capacity natural gas-fired rotary drum pulp dryer equipped with 2 parallel multicyclones and wet fan scrubbers at Settling Defendant's Facility and identified in Appendix A hereto;
- s. "Section" shall mean a portion of this Consent Decree identified by a roman numeral;
- t. "Settling Defendant" shall mean Michigan Sugar Company;
- u. "State" shall mean the State of Michigan;
- v. "Steam Dryer" shall mean the fluidized bed steam sugar beet pulp dryer installed and located at Settling Defendant's Facility as shown in Appendix A; and
- w. "United States" shall mean the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

9. No later than thirty (30) days after the Effective Date of this Consent Decree, Settling Defendant shall pay a civil penalty in the amount of TWO HUNDRED AND TEN THOUSAND DOLLARS (\$210,000.00) to the United States of America plus interest, at the rate established by the Secretary of the Treasury pursuant to 28 U.S.C. § 1961 as of the date of lodging of this Consent Decree, from the date the civil penalty is due, to the date of payment of the penalty.

10. Settling Defendant shall pay the civil penalty due by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with instructions to be provided to Settling Defendant upon entry of the Consent Decree by the Financial Litigation Unit (“FLU”) of the U.S. Attorney’s Office for the Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, MI 48226, telephone number: (313)226-9100. Any EFTs received at the DOJ lockbox bank after 11:00 a.m. Eastern Time will be credited on the next business day. At the time of payment, Settling Defendant shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. Michigan Sugar Company*, and shall reference the civil action number, United States Attorney’s Office (“USAO”) file number 2008-V-00710, and DOJ case number 90-5-2-1-08726, to the United States in accordance with Section XIV (Notices) of this Consent Decree; by email to acctsreceivable.CINWD@epa.gov; and by mail to:

U.S. EPA
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

11. Settling Defendant shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section VII (Stipulated Penalties) in calculating its federal, state or local income tax.

V. COMPLIANCE REQUIREMENTS

12. Settling Defendant shall implement the following injunctive relief at the Bay City Facility under this Consent Decree in accordance with the schedules set forth below:

a. When drying sugar beet pulp at the Bay City Facility, Settling Defendant shall operate and maintain the Steam Dryer or an alternative non-air pollutant-emitting sugar beet pulp drying technology, except as otherwise provided under this Consent Decree;

b. No later than December 1, 2007, Settling Defendant shall permanently shut down and decommission (remove from service) all operations of either Pulp Dryer #1, or Pulp Dryer #2, at the Bay City Facility;

c. No later than December 1, 2009, Settling Defendant shall permanently shut down and decommission (remove from service) all operations of the alternative remaining Pulp Dryer #2, or Pulp Dryer #1, at the Bay City Facility; provided, however, that in the event Settling Defendant's Steam Dryer has demonstrated 70% uptime (70% of the total number of operating hours during the Campaign Year) during the 2007-2008 Campaign Year, the shut down and decommissioning date shall be December 1, 2008;

d. For the Campaign Years beginning on or about September 1, 2009, and continuing to the complete and permanent shut down and decommissioning of Pulp Dryer #3, pursuant to Paragraph 12.e., below, Settling Defendant shall operate Pulp Dryer #3 at no greater than 30% of the maximum design capacity of Pulp Dryer #3 measured in mmBTUs natural gas heat input, to be capped at a maximum Campaign Year usage of 97,893 mmBTUs, or 97,893,000 cubic feet of natural gas;

e. No later than May 31, 2014, Settling Defendant shall permanently shut down and decommission (remove from service) all operations of the remaining Pulp Dryer #3 at the Bay City Facility;

f. Beginning with the Campaign Year starting on or about September 1, 2009, Settling Defendant shall report under Paragraph 13.a, below, the average moisture content of the pressed sugar beet pulp dried during both the current and the preceding Campaign Years;

i. If the moisture content of the pressed sugar beet pulp dried during the preceding Campaign Year is 70% or greater there shall be no adjustment to the natural gas usage limitation for Pulp Dryer #3 for the current Campaign Year.

ii. If the moisture content of the pressed sugar beet pulp dried during the preceding Campaign Year is less than 70%, then the natural gas usage limitation for Pulp Dryer #3 for the current Campaign Year measure in cubic feet of natural gas shall be limited as follows:

- a. 69%-69.99% moisture = 90,000,000 cubic feet
- b. 68%-68.99% moisture = 80,000,000 cubic feet
- c. 67%-67.99% moisture = 70,000,000 cubic feet
- d. 66%-66.99% moisture = 60,000,000 cubic feet
- e. 65%-65.99% moisture = 50,000,000 cubic feet

- f. 64%-64.99% moisture = 40,000,000 cubic feet
- g. 63%-63.99% moisture = 30,000,000 cubic feet
- h. 62%-62.99% moisture = 20,000,000 cubic feet
- i. 61%-61.99% moisture = 10,000,000 cubic feet
- j. at less than 61% moisture Pulp Dryer #3 would not have any natural gas allowance for the current Campaign Year and would not operate.

g. No later than ninety (90) days after the date of entry of this Decree by the Court, Settling Defendant shall submit appropriate Title V and other federally enforceable permit applications to the State of Michigan DEQ for Pulp Dryers ##1, 2, and 3 at the Bay City Facility, incorporating the pulp dryer shutdown and decommissioning schedules, interim measures and prohibition on using emissions reductions as credits set forth in this Paragraph 12 that begin on or about December 1, 2007, and continue to the complete and permanent shutdown and decommissioning of the final Pulp Dryer #3 on or before May 31, 2014. Settling Defendant's Title V and other federally enforceable permit application shall also provide for the withdrawal of any permits for the Pulp Dryers at the Bay City Facility as they are shut down and shall include provisions for the operation of the Steam Dryer, or alternative non-air pollutant-emitting sugar beet pulp drying technology implemented by Settling Defendant, as required by the Clean Air Act and/or Michigan law and this Consent Decree;

h. Settling Defendant shall cooperate fully with Michigan DEQ with respect to that Agency's processing of Settling Defendant's Title V and other federally enforceable permit applications for the Facility, and shall promptly comply with all reasonable requests for required information, monitoring, testing and reporting made by Michigan DEQ with respect to Settling Defendant's applications. Nothing in this Paragraph shall be construed to limit Settling Defendant's rights to appeal, under the Michigan SIP, any

determinations made by the Michigan DEQ with respect to Settling Defendant's Title V or other federally enforceable permit applications, or any amendments thereto. If Settling Defendant appeals any disputed terms and conditions imposed by Michigan DEQ, Settling Defendant shall pursue such appeals in an expeditious fashion and shall comply with the final Title V and other federally enforceable permits obtained from the Michigan DEQ pursuant to Settling Defendant's applications; and,

i. PSD and Major Nonattainment Credits. Settling Defendant shall not generate or use any VOC or CO emissions reductions that result from any projects conducted or utilized to comply with this Consent Decree as netting reductions or emission offset credits in any PSD, major non-attainment and/or minor NSR permit or permit proceeding under the Act or Michigan SIP. Settling Defendant may not use any credits resulting from the emissions reductions at Bay City Facility required in this Consent Decree in any emissions banking, trading or netting program for PSD, major non-attainment NSR or minor NSR, under the Act or Michigan SIP.

VI. REPORTING REQUIREMENTS

13. Settling Defendant shall submit the following reports:

a. Within thirty (30) days after January 1 and July 1 of each calendar year beginning after the lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII (Termination), Settling Defendant shall submit in writing reports for the preceding six (6)-month time period that shall include a progress report on the status of implementation of the Compliance Requirements of Section V (Compliance Requirements), above, including data and information that identifies when Settling Defendant began operations

of each Pulp Dryer for the applicable Campaign Year; when Settling Defendant ceased operations for each Pulp Dryer for the applicable Campaign Year; average moisture content of the pressed sugar beet pulp as required by Subparagraph 12.f., above; how many cubic feet of natural gas were used in the operation of natural gas restricted Pulp Dryer #3 during the preceding 6-month time period beginning with the January 31, 2010 report; startup and shutdown of operations, and operating uptime (the total number of operating hours during the reporting period) of the Steam Dryer for the Campaign Year 2007-2008; status of Settling Defendant's Title V and other federally enforceable permit applications, and the status of any other permitting of any alternative non-air pollutant emitting technology implemented by Settling Defendant; and, Settling Defendant's compliance with the terms and conditions of the final, issued Title V and other federally enforceable Permits, relating to sugar beet pulp drying operations. The reports shall also include a description of any noncompliance with the requirements of this Consent Decree and an explanation of the likely cause of such noncompliance and of the remedial steps taken, or to be taken, to prevent or minimize such noncompliance.

b. If Settling Defendant noncomplies, or has reason to believe it may noncomply with, any requirement of this Consent Decree or of any applicable permits, Settling Defendant shall notify the United States and the State of Michigan MDEQ of such noncompliance and its likely duration in writing within ten (10) working days of the day Settling Defendant first becomes aware of the noncompliance, with an explanation of the noncompliance's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such noncompliance. If the cause of a noncompliance cannot be fully explained at the

time the report is due, Settling Defendant shall include a statement to that effect in the report. Settling Defendant shall immediately investigate to determine the cause of the noncompliance and then shall submit an amendment to the report, including a full explanation of the cause of the noncompliance, within thirty (30) days of the day Settling Defendant becomes aware of the cause of the noncompliance. Nothing in this Paragraph relieves Defendant of its obligation to provide the notice required by Section VIII (Force Majeure) of this Consent Decree.

14. All reports shall be submitted to the persons designated in Section XIV (Notices) of this Consent Decree.

15. Each report submitted by Settling Defendant under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my inquiry of those individuals immediately responsible for obtaining the information, that I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting materially false information, including the possibility of fines and imprisonment.

16. Settling Defendant shall retain all underlying documents from which it has compiled any report or other submission required by this Consent Decree until five years after termination of the Consent Decree.

17. The reporting requirements of this Consent Decree do not relieve Settling Defendant of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, or requirement.

18. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law; provided, however, any information claimed to be confidential business information or trade secrets shall be provided under the terms of 40 C.F.R. Part 2, Subpart B.

VII. STIPULATED PENALTIES

19. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in this Section to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section VIII (Force Majeure).

“Compliance” shall include completion of the activities under this Consent Decree, or any work plan or other plan approved under this Consent Decree, in accordance with all applicable requirements of this Consent Decree, and within the specified time schedules established by and approved under this Consent Decree. “Compliance” shall also include payment of the civil penalty, meeting the reporting requirements of this Consent Decree, and meeting the applicable Compliance Requirements set forth in Section V (Compliance Requirements).

20. Compliance Milestones

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with the requirements identified in Subparagraphs b and c of this Paragraph:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$2,000	1st through 14th day
\$3,000	15th through 30th day

\$5,000

31st day and beyond

- b. Payment of the civil penalty under this Consent Decree; and
- c. Compliance Requirements of Section V (Compliance

Requirements) of this Consent Decree.

21. Reporting Requirements. The following stipulated penalties shall accrue per violation per day for any noncompliance with the reporting requirements of Section VI (Reporting Requirements) of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$1,500	15th through 30th day
\$2,000	31st day and beyond

22. Settling Defendant shall pay any stipulated penalty within thirty (30) days of receiving the United States' written demand. Stipulated penalties shall be paid by certified or cashier's check in the amount due, payable to the "Treasurer, United States of America," referencing DOJ No. 90-5-2-1-08726, and USAO file number 2008-V-00710, and shall be transmitted to the office of the United States Attorney, Eastern District of Michigan, Financial Litigation Unit, 211 W. Fort Street, Suite 2001, Detroit, MI 48226.

23. All stipulated penalties shall begin to accrue on the day after the performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this

Consent Decree, except that when two or more violations are based upon the same noncompliance, the higher stipulated penalty shall apply.

24. Penalties shall continue to accrue as provided in accordance with Paragraph 23 during any dispute resolution, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, accrued penalties determined to be owing, together with accrued interest, shall be paid to the United States within thirty (30) days of the effective date of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Settling Defendant shall, within sixty (60) days of receipt of the Court's decision or order, pay all accrued penalties determined by the Court to be owing, together with accrued interest, except as provided in Subparagraph c, below; and

c. If the District Court's decision is appealed by any Party, Settling Defendant shall, within fifteen (15) days of receipt of the final appellate court decision, pay all accrued penalties determined to be owing to the United States, together with accrued interest.

25. Obligations Prior to the Effective Date. Upon the Effective Date of this Consent Decree, the stipulated penalty provisions of this Decree shall be retroactively enforceable with regard to any and all violations of Sections V (Compliance Requirements) and VI (Reporting Requirements) of this Consent Decree that have occurred prior to the Effective Date of the Decree, provided that stipulated penalties that may have accrued prior to the

Effective Date may not be collected unless and until this Consent Decree is entered by the Court.

26. Should Settling Defendant fail to pay stipulated penalties and accrued interest in accordance with the terms of this Consent Decree, the United States shall be entitled to collect interest and late payment costs and fees, as set forth in any applicable laws or regulations, together with the costs (including attorneys fees) incurred in any action necessary to collect any such stipulated penalties, interest, or any applicable late payment costs or fees.

27. Settling Defendant's payment of stipulated penalties under this Section shall be in addition to any other rights or remedies available to the United States by reason of Settling Defendant's failure to comply with any requirement of this Consent Decree or applicable law.

VIII. FORCE MAJEURE

28. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendant, its contractors, or any entity controlled by Settling Defendant that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. "Best efforts" include using best efforts to anticipate any potential Force Majeure event and to address the effects of any such event (a) as it is occurring, and (b) after it has occurred, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include Settling Defendant's financial inability to perform any obligation under this Consent Decree.

29. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, as to which Settling Defendant intends to assert a claim of Force Majeure, Settling Defendant shall provide notice in writing, as provided in Section XIV

(Notices) of this Consent Decree, within ten (10) Working Days of the time Settling Defendant first knew of, or by the exercise of due diligence should have known of, the event. Such notification shall include an explanation and description of the reasons for the delay; the anticipated duration of the delay; a description of all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and Settling Defendant's rationale for attributing such delay to a Force Majeure event. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of Force Majeure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant or its contractors knew or should have known.

30. Settling Defendant shall have the burden of proving, by a preponderance of the evidence, that each event described in the preceding Paragraph was a Force Majeure event; that Settling Defendant gave the notice required by the preceding Paragraph; that Settling Defendant took all reasonable steps to prevent or minimize any delay caused by the event; and that any period of delay it claims was attributable to the Force Majeure event was caused by that event.

31. If the Parties agree that Settling Defendant's delay in compliance was attributable to a Force Majeure event, the Parties shall stipulate to an extension of time for Settling Defendant's performance of the affected compliance requirement by a period not exceeding the delay actually caused by such event. In such circumstances, the appropriate modification shall be made pursuant to Section XVII (Modification) of this Consent Decree, where the modification is to a term of this Consent Decree. In the event the Parties cannot agree,

the matter shall be resolved in accordance with Section IX (Dispute Resolution) of this Consent Decree. An extension of time for performance of the obligations affected by a Force Majeure event shall not, of itself, extend the time for performance of any other obligation.

IX. DISPUTE RESOLUTION

32. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

33. Informal Dispute Resolution. Any dispute which arises under or with respect to this Consent Decree shall first be the subject of informal negotiations. The period of informal negotiations shall not exceed twenty (20) days from the time Settling Defendant sends the United States a written Notice of Dispute in accordance with Section XIV (Notices) of this Consent Decree, unless that period is modified by written agreement. Such Notice of Dispute shall state clearly the matter in dispute. The failure to submit a Notice of Dispute within ten (10) days from the date upon which the issue in dispute first arises waives Settling Defendant's right to invoke dispute resolution under this Section.

34. Formal Dispute Resolution.

a. If the Parties cannot resolve a dispute by informal negotiations pursuant to the preceding Paragraph, then the position advanced in writing by the United States during the informal negotiation period shall be considered binding unless, within fourteen (14) days after the conclusion of the informal negotiations period, Settling Defendant invokes formal

dispute resolution procedures by serving on the United States, in accordance with Section XIV (Notices) of this Consent Decree, a written Statement of Position on the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Settling Defendant's position and any supporting documentation relied upon by Settling Defendant.

b. Within forty five (45) days after receipt of Settling Defendant's Statement of Position, the United States will serve on Settling Defendant its Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

c. An administrative record of the dispute shall be maintained by EPA and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA or the Court may allow submission of supplemental Statements of Position by the parties to the dispute. That administrative record shall constitute the administrative record upon which the matter in dispute is to be resolved, when such resolution proceeds on the administrative record under this Section.

35. Resolution of Disputes.

a. During formal Dispute Resolution, the Director of the Air and Radiation Division, EPA Region 5, will issue a final decision resolving the matter in dispute. Where the dispute pertains to the performance of the compliance requirements under Section V

(Compliance Requirements) of this Consent Decree, or is otherwise accorded review on the administrative record under applicable principles of administrative law, the decision shall be upon the administrative record maintained by EPA pursuant to Paragraph 34 (c), above. The decision of the Air and Radiation Division Director shall be binding upon Settling Defendant, subject only to the right to seek judicial review, in accordance with Subparagraph b, below.

b. The decision issued by EPA under Subparagraph a, above, shall be reviewable by this Court upon a motion filed by Settling Defendant and served upon the United States within twenty one (21) days of receipt of EPA's decision. In addition to containing the supporting factual data, analysis, opinion, and documentation upon which Settling Defendant relies, the motion shall describe the history of the matter in dispute, the relief requested, and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Settling Defendant may file a reply memorandum, to the extent permitted by the Local Rules or the Court.

c. In any judicial proceeding pursuant to Subparagraph b, above, that concerns the performance of the compliance requirements under Section V (Compliance Requirements) of this Consent Decree, or that is otherwise accorded review on the administrative record under applicable principles of administrative law, Settling Defendant shall have the burden of demonstrating, based on the administrative record that the decision of the EPA is arbitrary and capricious or otherwise not in accordance with law. Except as otherwise provided in this Consent Decree, in any other dispute brought under this Section, Settling Defendant shall

bear the burden of demonstrating that its position complies with this Consent Decree or applicable law.

36. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Settling Defendant under this Consent Decree, not directly in dispute, unless the United States agrees or the Court orders otherwise. Stipulated penalties with respect to the disputed matter, if applicable, shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 35, above. In the event that Settling Defendant does not prevail on the disputed issue, applicable stipulated penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

X. INFORMATION COLLECTION/RIGHT OF ENTRY

37. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry to any Facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain documentary evidence, including photographs and similar data; and
- d. assess Settling Defendant's compliance with this Consent Decree.

38. This Consent Decree in no way limits or affects any right of entry and

inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Settling Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XI. FAILURE OF COMPLIANCE

39. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Settling Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act and the Michigan SIP. Notwithstanding the United States' review and approval of any documents submitted to it by Settling Defendant pursuant to this Consent Decree, Settling Defendant shall remain solely responsible for compliance with the terms of the Act and this Consent Decree.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

40. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint that was filed in this action through the date of lodging of this Consent Decree.

41. This Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the Act, or under other federal or state laws, regulations, or permit conditions, except as expressly specified herein.

42. Settling Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, State and local laws, regulations, and permits; and Settling Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to said laws, regulations, or permits.

43. This Consent Decree does not apply to any claims of alleged criminal liability.

44. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief or civil penalties relating to the facility covered by the Complaint in this action, Settling Defendant shall not assert any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, or claim splitting, or any defense based upon the contention that claims raised by Plaintiff in the subsequent proceeding were brought, or should have been brought in the instant case; provided, however, that nothing in this Paragraph is intended to, or shall affect the validity of Paragraph 40 of this Consent Decree.

45. This Consent Decree does not limit or affect the rights of Settling Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Settling Defendant, except as otherwise provided by law.

46. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

47. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein.

XIII. COSTS

48. The Parties shall each bear their own costs of litigation of this action,

including attorneys fees, except that the United States shall be entitled to collect any costs, including, but not limited to, attorneys' fees incurred in any action necessary to collect any portion of the Civil Penalty or any Stipulated Penalties not paid by Defendant.

XIV. NOTICES

49. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, DC 20044-7611
Re: DOJ No. 90-5-2-1-08726

and

Ellen Christensen
Office of the United States Attorney
Eastern District of Michigan
211 W. Fort Street, Suite 2001
Detroit, MI 48226

To the U.S. Environmental Protection Agency

U.S. Environmental Protection Agency-Region 5
Attn: Compliance Tracker
77 West Jackson Boulevard (AE-17J)
Chicago, IL 60604

To Settling Defendant:

Mr. Mark Flegenheimer, President
Michigan Sugar Company
2600 South Euclid Avenue

Bay City, Michigan 48706

and

Mr. Steven Smock
Michigan Sugar Company
2600 South Euclid Avenue
Bay City, Michigan 48706

and

Mr. Charles M. Denton
Varnum Riddering Schmidt & Howlett
P.O. Box 352
Grand Rapids, Michigan 49501

50. Notices submitted pursuant to this Section shall be deemed effective upon receipt, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XV. EFFECTIVE DATE

51. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted by Court Order, whichever occurs first as recorded on the Court's docket.

XVI. RETENTION OF JURISDICTION

52. Continuing Jurisdiction. The Court retains jurisdiction of this case after entry of this Consent Decree, until termination of the Consent Decree, to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution, or modification, and/or to resolve disputes between the parties as provided in Section VIII (Force Majeure) and Section IX

(Dispute Resolution) provisions of this Consent Decree. During the term of this Consent Decree, any Party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

XVII. MODIFICATION

53. The terms of this Consent Decree, including any attached Appendices, may be modified only by a subsequent written agreement signed by all the Parties or by Order of the Court. Where the modification constitutes a material change to this Consent Decree, it shall be effective only upon approval by the Court.

54. Any disputes concerning modification of this Consent Decree shall be resolved pursuant to Section IX (Dispute Resolution) of this Decree, provided, however, that, instead of the burden of proof provided by Paragraph 35, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XVIII. TERMINATION

55. Conditional Termination of Enforcement Through Consent Decree. After Settling Defendant has applied to amend its permits pursuant to this Consent Decree and has obtained a final Title V and other federally enforceable operating permits issued under the Michigan SIP for the Facility that include as enforceable permit terms the requirements set forth in Paragraph 12 of this Consent Decree, then Settling Defendant may so certify these facts by submitting notice to the United States and this Court. If the United States does not object in writing with specific reasons within forty-five (45) days of receipt of Settling Defendant's notice then, for any Consent Decree violations that occur after the filing of notice, the United States

may pursue enforcement of the requirements contained in the final Title V and other federally enforceable operating Permits issued by the Michigan DEQ under the Michigan SIP through the applicable Permits but not through this Consent Decree and Settling Defendant may, by motion to this Court, seek termination of the provision or provisions of this Consent Decree that imposed the requirement pursuant to this Section. Conditional Termination pursuant to this Paragraph may not occur prior to the shutdown of Pulp Dryer #3.

56. After Settling Defendant has completed all the requirements of Section V (Compliance Requirements) of this Decree and has paid the Civil Penalty and any accrued Stipulated Penalties and any applicable Interest, penalties and fees as required by this Consent Decree, Settling Defendant may serve upon the United States a Request for Termination of the Consent Decree, together with all necessary supporting documentation, stating that Settling Defendant has satisfied those requirements.

57. Following receipt by the United States of Settling Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Settling Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

58. If the United States does not agree that the Decree may be terminated, Settling Defendant may invoke Dispute Resolution under Section IX (Dispute Resolution) of this Decree. However, Settling Defendant shall not seek Dispute Resolution of any dispute regarding

termination under Section XVIII (Termination) of this Consent Decree until thirty (30) days after service of its Request for Termination.

XIX. PUBLIC PARTICIPATION

59. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7 and Section 113(g) of the Act, 42 U.S.C. § 7413(g). The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate, in which case, the Consent Decree shall be null and void. The Settling Defendant consents to entry of this Consent Decree without further notice.

XX. SIGNATORIES/SERVICE

60. Each undersigned representative of Settling Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

61. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

62. Settling Defendant hereby agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified settlement Settling Defendant in writing that it no longer supports entry of the Decree.

63. Settling Defendant hereby agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXI. INTEGRATION/APPENDICES

64. This Consent Decree and its Appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written. Other than the Appendices, which are attached to and incorporated in this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, not contained herein, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXII. FINAL JUDGMENT

65. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Settling Defendant.

XXIII. APPENDIX

66. The following appendix is attached to and incorporated into this Consent Decree: "Appendix A" is the map/diagram of Settling Defendant's Bay City, Michigan Facility.

Dated and entered this ____ day of _____, 2008.

UNITED STATES DISTRICT JUDGE
Eastern District of Michigan

FOR THE UNITED STATES OF AMERICA:

Date: May 8, 2008

⁴
RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: May 9, 2008

FRANCIS J. BIRDS
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

STEPHEN J. MURPHY
United States Attorney
Eastern District of Michigan

Date: _____

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9100

FOR THE U.S. ENVIRONMENTAL
PROTECTION AGENCY:

Date: May 7, 08

Bharat Mathur
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604
77 W. Jackson Boulevard
Chicago, IL 60604

Date: May 7, 08

Robert A. Kaplan /
Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

Date: May 6, 08

NIDHI K. O'MEARA
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

United States v. Michigan Sugar Company

FOR THE U.S. ENVIRONMENTAL
PROTECTION AGENCY:

Date: April 24, 08

WALKER B. SMITH
Director
Office of Civil Enforcement, OECA
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
 0 1 /

Date: April 21, 2008

ADAM M. KUSHNER
Director
Air Enforcement Division
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

FOR DEFENDANT MICHIGAN SUGAR CO.:

Date: 03/17/2008

Signature: _____

Typed Name: Herbert C. Wilson

Title: Vice President of Operations

Address: 2600 S. Euclid Ave.

Bay City, MI 48706

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Bruce Goodman

Title: Counsel to Michigan Sugar Company

Address: P.O. Box 352

Grand Rapids, MI 49501

APPENDIX A

